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IN THE

Supreme Court of the United States

October Term 1958

No. 357

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY AND AUTOMOBILE OWNERS SAFETY INSURANCE COMPANY
Petitioners

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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Petitioners respectfully submit this reply to the Solicitor General's brief in opposition to the petition for certiorari.

1. The Solicitor General's insistence that petitioners did not present to the Commission or the court below, and expressly "waived", the question of the Commis-

sion's jurisdiction is suprising to us in view of the following facts:

(1) On December 6, 1954, at a prehearing conference before the Commission in these cases, Robert R. Sills, the Commission's chief counsel, stated, at the outset of the Commission's case (ATr. 12, OTr. 12):[1]

> "I would like now to discuss with you basically the position that will be adopted by those in support of these complaints with respect to the Commission's jurisdiction.
>
> "*First of all paramount above everything else is one basic legal factor or legal maxim, that you cannot, by any admission of yours confer jurisdiction upon this Commission.* * * *" [Italics added].

(2) Petitioners raised the question of jurisdiction by motion at the outset of the proceeding, by motion at the end of the evidence in support of the complaints, and by requests for findings of fact and conclusions of law at the end of all the evidence. The hearing examiner discussed the question of jurisdiction in his final decision; his discussion occupies seven pages of the printed record (AR. 19-26; see also OR. 22-23).

(3) The Commission adopted as part of its own final order that portion of the examiner's decision which dealt with the jurisdictional issue (AR. 47). The Commission's first conclusion of law in each case was that the "Commission has full jurisdiction" (AR. 45, OR. 33; Pet. App. 17a).[2] The obvious reason why it did not discuss in its opinions (as distinguished from its find-

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[1] The page references are to the transcript of the testimony before the Commission.

[2] The quoted conclusion in the *Automobile Owners* case modestly omits the word "full".

ings of fact and conclusions of law) the question of jurisdiction was that, so far as the Commission was concerned, the issue had been fully disposed of by its opinions in the two cases which were before this court in *FTC* v. *National Casualty Co.*, 357 U. S. 560, as well as in *North American Accident Insurance Co.*, FTC Docket No. 6456, and *Travelers Health Ass'n*, FTC Docket No. 6252. In the latter two decisions, the Commission had dealt with aspects of its jurisdiction over mail order insurance. All of these decisions had just recently been handed down by the Commission when it decided the present cases.

(4) The Commission's general counsel argued the question of the Commission's jurisdiction in the court below in his briefs and orally. Petitioners' counsel stated to the court below in oral argument that jurisdiction could not be waived but that argument would not be fruitful because the question was under consideration by another panel of the same Circuit in *Travelers Health* v. *FTC*, (still pending in the Circuit) and under consideration by this Court in the *National Casualty Co.* case, *supra*, all of which had then been recently argued.

In these circumstances, the cases cited by the Solicitor General, which hold only that it is improper to raise a question on review which the agency had no opportunity to consider, are not apposite. The Commission cannot here claim lack of opportunity because it repeatedly seized the opportunity of considering its jurisdiction. Nor can it claim surprise; it is petitioners who are surprised, by the Commission's change in position.

2. The Solicitor General's suggestion that this Court should not consider the "paramount" issue of juris-

diction because the court below decided the issue in favor of the Commission *sub silentio* overlooks two facts: (a) that the Commission argued in support of its jurisdiction and the court below sustained and enforced the order and (b) that the decision below was issued prior to this Court's opinion in *National Casualty,* which reserved the issue of jurisdiction in the factual setting of these cases. If the failure of the court below to discuss at any length the considerations which led to affirmance of the Commission's jurisdiction is a ground for refusing to review these cases, the fair course would be to remand for an expression of the views of the court below rather than to decree enforcement of a perpetual order the Commission had no power to make.

3. The Solicitor General's suggestion that the jurisdictional question presented by these cases is not of general importance because it involves interpretation of the false advertising statute of a particular state is incorrect. It blinks the fact, which this Court expressly recognized in its *National Casualty* opinion, that the State statutes regulating insurance advertising are "essentially the same" in substantially all the states. (*FTC* v. *National Casualty Co.,* 357 U.S. 560, 564 n. 6). Missouri, although not having the Model Unfair Trade Practices law, has the kind of statute, also prevalent in numerous other states, that this Court correctly characterized as "essentially the same" as that law.

Moreover, it is specious to suggest that the present issue is essentially one of interpreting state law. The contested question is actually one of interpreting the

McCarran-Ferguson Act, and that does not change from state to state.

Respectfully submitted,

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